UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 44

Docket Nos. DE-1221-09-0295-W-2
DE-0752-11-0097-I-1
DE-1221-10-0390-W-1

Melvin Y. Shibuya,

Appellant,

v.

Department of Agriculture,

Agency.

June 14, 2013

David S. Handsher, Esquire, San Francisco, California, for the appellant.

Inga Bumbary-Langston, Esquire, and Albert T. Berry, Esquire, Washington, D.C., for the agency.

Gary M. Gilbert, Esquire, and Deryn Sumner, Esquire, Silver Spring, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed the demotion action and granted corrective action under the

Whistleblower Protection Act (WPA) in the joined appeals.[1] For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the case to the Denver Field Office for further adjudication.

BACKGROUND

¶2 In April 2009, the appellant filed an individual right of action (IRA) appeal. MSPB Docket No. DE-1221-09-0295-W-1, Initial Appeal File (IAF-0295-1), Tab 1. He alleged that, in April 2008, he disclosed to the Office of Special Counsel (OSC) that the Chief Financial Officer (CFO) of the Forest Service misused his government credit card and was delinquent in paying his government credit card bills.[2] IAF-0295-1, Tab 1 at 6; *see* IAF-0295-2, Tab 18, Subtab B at 40, 75. The appellant contends that, beginning in December 2008, in reprisal for making this disclosure to OSC,[3] the agency investigated him for alleged misconduct concerning his advice to destroy emails that he believed were potentially discoverable in future litigation and, while the investigation was pending, the agency relocated his office and significantly changed his duties by assigning him

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[2] Although the appellant reported the CFO's misconduct to different managers in 2007 and 2008, it was not until after he notified his first- and second-line supervisors of his OSC disclosure that the Forest Service referred the matter to the U.S. Department of Agriculture (USDA). *See* February 2, 2011 Hearing Transcript at 39-48; MSPB Docket No. DE-1221-09-0295-W-2, Initial Appeal File (IAF-0295-2), Tab 18, Subtab A, Subtab B at 75. In May 2008, the USDA Office of Human Capital Management (OHCM) investigated the CFO and, in October 2008, OHCM issued a report of investigation that substantiated the appellant's allegations regarding the CFO. IAF-0295-2, Tab 18, Subtab B at 5, 17-30. In November 2008, the appellant informed the Associate Deputy Chief of Business Operations of his OSC complaint. IAF-0295-2, Tab 18, Subtab I; MSPB Docket No. DE-1221-10-0390-W-1, Initial Appeal File, Tab 5, Subtab 4e at 20.

[3] The appellant disclosed to OSC the CFO's misuse of his government credit card and the agency's failure to take action on the matter. IAF-0295-2, Tab 18, Subtab B at 40.

filing duties, among other things. IAF-0295-1, Tab 1. Subsequently, the administrative judge dismissed the appeal without prejudice to re-filing. IAF-0295-1, Tab 13.

¶3 Also in April 2009, OSC referred the appellant's allegations about the CFO to the Office of the Secretary of Agriculture, and that office referred the allegations to the Office of Inspector General (OIG). IAF-0295-2, Tab 18, Subtab B at 6. On August 12, 2009, OIG issued a report of investigation that substantiated the appellant's allegations and criticized USDA and the Forest Service for the delay in removing the CFO and for awarding the CFO a $13,000 performance award in December 2008 and a salary increase in 2009, when they knew that OHCM was proposing the CFO's removal. IAF-0295-2, Tab 18, Subtab B.

¶4 On December 16, 2009, the agency proposed to demote the appellant from a GS-14 Branch Chief of Employee Relations to a GS-13 Human Resource Liaison based on two charges. MSPB Docket No. DE-1221-10-0390-W-1, Initial Appeal File (IAF-0390), Tab 5, Subtab 4c. First, the agency charged the appellant with poor judgment–soliciting the unauthorized destruction of government records. Specifically, the agency alleged that, in emails dated June 29, August 12, and September 26, 2007, and September 24, 2008, the appellant advised employees to destroy emails that he believed were discoverable in future third-party proceedings. *Id.* at 1-5. Second, the agency charged the appellant with poor judgment—conduct unbecoming a federal employee, alleging that he engaged an outside attorney contractor, William Wiley, to "launder" case analyses[4] drafted by agency employees in order to create the appearance that the analyses were

[4] The case analyses are pre-decisional memoranda that analyze the strengths and weaknesses of the agency's case in proposed adverse actions. *See* IAF-0390, Tab 5, Subtab 4e at 5. The agency used the term "launder" in the charge. The Board construes the term solely as descriptive of the appellant's conduct and without regard to any meaning that the term may have in a criminal context.

subject to an attorney-client or work-product privilege, thereby protecting the analyses from disclosure in third-party proceedings. *Id.* at 3-6.

¶5 The appellant filed a second OSC complaint, alleging that the agency proposed to demote him in reprisal for disclosing to OSC the CFO's misuse of his government credit card and the agency's inaction on the matter. IAF-0390, Tab 1. On April 29, 2010, OSC closed its investigation without corrective action. IAF-0390, Tab 1 at 17. On May 11, 2010, the agency informed the appellant that his demotion would become effective on June 6, 2010. IAF-0390, Tab 5, Subtab 4a.

¶6 The appellant timely re-filed his April 2009 IRA appeal regarding the agency's investigation into his alleged misconduct, the relocation of his office, and the alleged significant changes in his job duties. IAF-0295-2, Tab 1. Subsequently, the appellant filed a second IRA appeal on May 16, 2010, alleging that the agency proposed the demotion action in reprisal for his disclosure of the CFO's misuse of his government credit card.[5] IAF-0390, Tab 1. The appellant also filed a chapter 75 appeal of the demotion action, raising an affirmative defense of whistleblower reprisal.[6] MSPB Docket No. DE-0752-11-0097-I-1

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[5] Although the appellant asserted in his May 16, 2010 IRA appeal that he was challenging both the proposed and the effected demotion actions, the record reflects that OSC closed its investigation into the appellant's complaint about the proposed demotion on April 29, 2010, the agency did not issue its decision on the proposed demotion until May 13, 2010, and the demotion was not effected until June 6, 2010. IAF-0390, Tab 1 at 3, 5, 17, 20-21. Thus, the appellant could not have exhausted his administrative remedies before OSC regarding the actual demotion. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 8 (2011). Accordingly, because the appellant did not raise the implemented demotion action before OSC, he was not precluded under 5 U.S.C. § 7121(g) from subsequently filing a demotion appeal with the Board under chapter 75.

[6] We note that, in his chapter 75 appeal, the appellant alleged that: "[t]he discipline and choice of penalty are the product of whistleblower reprisal," "[t]he charges constitute harmful procedural error in that they are defective in specifying and characterizing the misconduct," and the agency's errors denied him "basic due process." MSPB Docket No. DE-0752-11-0097-I-1, Initial Appeal File, Tab 1 at 2. However, during the

(IAF-0097), Tab 1. The administrative judge joined the appellant's three appeals. IAF-0390, Tab 13.

¶7 After holding a hearing, the administrative judge reversed the chapter 75 demotion action and granted corrective action under the WPA in the joined IRA appeals.[7] IAF-0390, Tab 14, Initial Decision (ID) at 42. In the chapter 75 action, the administrative judge found that the agency failed to prove either of its charges. ID at 26, 30. Regarding the charge of poor judgment—soliciting the unauthorized destruction of government record, the administrative judge determined that: (1) the charge was impermissibly vague as to the meaning of the term "government records"; and (2) the agency identified no law, rule, or regulation that the appellant violated in failing to preserve or maintain the emails at issue. ID at 22-26. Regarding the charge of poor judgment—conduct unbecoming a federal employee, the administrative judge found that the appellant's idea of having Mr. Wiley review the case analyses so that an attorney-client or work-product privilege would attach demonstrated poor judgment, but the practice was abandoned after less than a month, only one employee sent Mr. Wiley materials before the appellant rescinded the practice, and the appellant's advice did not rise to the level of actionable misconduct. ID at 26-30.

¶8 Regarding the appellant's reprisal for whistleblowing claims, the administrative judge determined that the Board has jurisdiction over the

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prehearing conference, the administrative judge found that the appellant only raised an affirmative defense of whistleblower reprisal. IAF-0295-2, Tab 27 at 2. As the appellant did not object to the prehearing conference summary that limited the issues for adjudication, and nowhere else in his Board pleadings does he argue harmful procedural error or denial of due process, we find that the appellant decided to only proceed with his whistleblower reprisal claim.

[7] We note that the administrative judge indicated in the initial decision that she was granting corrective action for the demotion appeal. IAF-0390, Tab 14, Initial Decision at 2-3. "Corrective action," however, is not available in chapter 75 appeals.

appellant's IRA appeals. ID at 5-7. She found that the appellant proved that he made a protected disclosure to OSC regarding the CFO's misuse of his government credit card and travel funds and the agency's inaction, which was a contributing factor in the agency's decision to significantly change the appellant's duties, relocate his office, investigate him for misconduct, and propose and implement the demotion action. ID at 32-35. The administrative judge further determined that the agency failed to prove by clear and convincing evidence that, absent the appellant's whistleblowing, it would have taken the aforementioned personnel actions. ID at 35-42.

¶9 The agency has filed a petition for review. Petition for Review (PFR) File, Tab 5. The appellant has responded in opposition. PFR File, Tabs 8, 9.

ANALYSIS

Demotion action

1. The agency proved charge 1: poor judgment—soliciting the unauthorized destruction of government records.

¶10 With regard to charge 1, the agency charged the appellant as follows:

> **Reason 1**: Poor Judgment—Soliciting the Unauthorized Destruction of Government Records
>
> The above facts demonstrate that, as you admit, you advised Agency officials to destroy e-mail messages that you believed could be subject to disclosure in third-party proceedings. Not only did your advice and guidance subject the Agency to potential sanctions in a future third-party proceeding but your advice contradicted Departmental policy regarding the retention of records provided in Departmental Regulation 3090-001.

IAF-0390, Tab 5, Subtab 4c at 5. As set forth above, the administrative judge found this charge impermissibly vague and found that the agency failed to articulate how the appellant's actions violated any law, rule, or regulation. ID at 22-26.

¶11 As an initial matter, we disagree with the administrative judge that the agency's failure to define "government records" rendered charge 1 impermissibly

vague. The question is not whether the agency has satisfied the standard for a hypertechnical common law pleading, *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 203 (1997), but whether the information that it provided was sufficiently specific to permit the appellant to respond to the charge, *Ragolia v. United States Postal Service*, 52 M.S.P.R. 295, 301 (1992). In this case, the agency was perfectly clear that the "government records" that it was referring to were particular emails. It identified those records by dates and names of recipients, and it quoted portions of the appellant's emails in which he advised that the records be destroyed. IAF-0390, Tab 5, Subtab 4c at 1-5. The appellant did not claim confusion on this matter, and his response to the notice of proposed demotion shows that he understood very well with what he was being charged. *Id.*, Subtab 4b. In addition, we find that there was nothing else otherwise improper or inaccurate about the agency referring to the emails as "government records." In the absence of any indication that a specific statutory or regulatory definition should apply, the Board will interpret a term in accordance with normal usage and ordinary meaning. *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶ 7 (2011). Moreover, it is well recognized that official emails sent by federal employees are "government records." *See* 44 U.S.C. § 3301; *see, e.g.*, *Houghton v. United States Department of State*, 875 F. Supp.2d. 22, 29-30 (D.D.C. 2012).

¶12 As for whether the agency identified any law, rule, or regulation that the appellant violated, we find that this is immaterial to whether the agency proved charge 1. Rather, this pertains to whether there is a nexus between the charge and the efficiency of the service.[8] The issues of whether the agency proved the charge and whether there is a nexus between the charge and the efficiency of the service exist quite separate and apart. *Pope v. U.S. Postal Service*, 114 F.3d 1144 (Fed. Cir. 1997) (to support an adverse action an agency must prove three

[8] This matter may also be relevant to the issue of penalty.

things: that the charged conduct occurred, that there is a nexus between that conduct and the efficiency of the service, and that the penalty imposed is reasonable). Putting the issue of nexus aside, we find it undisputed that the appellant solicited the destruction of government records as described in the agency's narrative specification.[9] IAF-0390, Tab 5, Subtab 4c at 5. We therefore SUSTAIN charge 1.

2. The agency proved charge 2: poor judgment—conduct unbecoming a federal employee.

¶13 Under the charge of poor judgment—conduct unbecoming a federal employee, the agency specified that the appellant demonstrated poor judgment when he agreed to have Mr. Wiley review case analyses in order to give the appearance that the analyses were covered by an attorney-client or work-product privilege. IAF-0390, Tab 5, Subtab 4c at 5-6. In not sustaining this charge, the administrative judge found that the exercise of poor judgment alone is no basis for discipline, that the appellant abandoned his scheme with Mr. Wiley in less than a month, that only one employee actually sent materials to Mr. Wiley, and that, even if the directive were actionable misconduct, it would not support the demotion penalty. As with charge 1, we find that the administrative judge conflated nexus and penalty with proof of the charge itself. These matters are irrelevant to whether the agency proved the charge. *Supra* ¶ 12.

¶14 Because this is a narrative charge, we find that it must be viewed in light of the accompanying specifications and circumstances and should not be technically construed. *See Otero*, 73 M.S.P.R. at 202. Based on the language of the charge, we find that, to prove it, the agency must establish that: (1) the appellant

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[9] Regardless of whether Departmental Regulation 3090-001 or any other agency rule forbade the appellant's actions, we note that there is a general duty to preserve evidence that may be relevant to reasonably foreseeable litigation. *Micron Tec Inc. v. Rambus, Inc.*, 645 F.3d 1311 (Fed. Cir. 2011).

engaged Mr. Wiley to review the office's case analyses; (2) the purpose of the arrangement was to create the appearance that the case analyses were privileged documents; and (3) the arrangement was nothing more than a "laundering" scheme to improperly protect the case analyses from discovery in future third-party proceedings. *See id*.

¶15 The appellant does not dispute that he engaged Mr. Wiley to review case analyses drafted by agency employees for the purpose of asserting an attorney-client or work-product privilege in order to prevent the disclosure of case analyses in future third-party proceedings. *See* IAF-0390, Tab 5, Subtab 4b at 3, Subtab 4d at 6-7. In his response to the notice of proposed demotion, the appellant merely alleged that "the very act of shielding case analyses from discovery" is not unlawful and that "[f]ollowing the advice of a contract attorney cannot constitute conduct unbecoming a Federal employee." *Id.*, Subtab 4b at 3.

¶16 Regarding purpose of the arrangement, the record contains an email dated September 6, 2008, in which Mr. Wiley stated that "[s]ince we have this standing contract, you might as well take advantage of my lawyer-ness." He informed the appellant that he would only make comments that were "absolutely necessary," that his review "shouldn't cost more than a couple of tenths of an hour," and that charging the agency for his review would "remove any doubt that this is an official lawyer-client relationship . . . . That's a cheap easy procedure to keep a critical document away from the dark side." IAF-0390, Tab 5, Subtab 4h at 1. Mr. Wiley further advised the appellant that case analyses should be emailed to him so that the documents could be issued with an attorney-client privilege statement. *Id.* We find that the weight of the record evidence supports the agency's position that the purpose of Mr. Wiley's review was to prevent the disclosure of case analyses drafted by agency employees in future third-party proceedings by creating the appearance that the case analyses were privileged documents.

¶17 As for whether the arrangement was inappropriate, we find that it contravenes the agency's obligation during litigation to disclose non-privileged, discoverable information when requested by the other party, and not to fabricate a privilege in order to prevent the discovery of information. *See generally* Fed. R. Civ. P. 26(b)(1) and (b)(5)(B). Attorney-client privilege exists for the sake of the attorney-client relationship—not the other way around. *See Fisher v. United States*, 425 U.S. 391 (1976) (the purpose of attorney-client privilege is to encourage clients to make full disclosure to their attorneys, and it only applies where necessary to achieve that purpose). We find that this scheme was an abuse of the privilege and that the agency was right to be concerned by it. The Board takes the integrity of its discovery process seriously. We do not condone the specious "attorney-client relationship" that the appellant and Mr. Wiley cooked up in order to play some procedural game with our administrative judges. We find that the arrangement was inappropriate, and we SUSTAIN charge 2.

3. On remand, the administrative judge shall address the issues of nexus and penalty.

¶18 In addition to proving the charged misconduct by preponderant evidence, for an agency to prevail in an adverse action, it must also show a nexus between the sustained misconduct and the efficiency of the service, and that the penalty is within the tolerable limits of reasonableness. *Hall v. Department of Defense*, 117 M.S.P.R. 687, ¶ 6 (2012). Because the administrative judge did not sustain the agency's charges, she did not address the issues of nexus and penalty.[10] *See* ID.

[10] As explained above, however, the administrative judge, in her charge analyses, identified a number of matters that may be pertinent to the issues of nexus and penalty: No one expressed contemporaneous concerns about the appellant's solicitation of record destruction, ID at 19-21; some of the solicitations predated any specific agency rule forbidding them, ID at 24; the appellant was unaware of the impropriety of the solicitations, ID at 23; the appellant stopped the solicitations as soon as he was ordered to do so, ID at 22; the appellant's improper arrangement with Mr. Wiley was of limited scope, ID at 29; and the appellant's conduct was based on Mr. Wiley's advice, ID at 26.

However, the agency did prove its charges, and the issues of nexus and penalty therefore need to be addressed. We find it most appropriate to remand these matters for the administrative judge to consider in the first instance because she is the one who heard the in-person testimony. *See Taylor v. Department of Homeland Security*, 107 M.S.P.R. 306, ¶ 13 (2007).

The appellant's affirmative defense of whistleblower reprisal[11]

¶19 In an adverse action appeal, such as the appellant's demotion appeal, an appellant's claim of whistleblower reprisal is treated as an affirmative defense. *Simmons v. Department of the Air Force*, 99 M.S.P.R. 28, ¶ 22 (2005). Once the agency proves its adverse action case by a preponderance of the evidence, the appellant must show by preponderant evidence that he made a disclosure protected under 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the agency's personnel action. *Id.*

The appellant proved that he made a protected disclosure that was a contributing factor in the covered personnel actions.

¶20 When an appellant raises whistleblowing as an affirmative defense to an agency action over which the Board has jurisdiction, the appellant must show by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), i.e., a disclosure of information that he reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a

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The administrative judge should consider these matters as appropriate, along with all the other relevant evidence, in her analysis of nexus and penalty. To the extent that these matters suggest that the agency would have taken lesser discipline or no discipline at all under normal circumstances, the administrative judge should consider them in her clear and convincing evidence analysis as well. *Infra* ¶ 39.

[11] The Whistleblower Protection Enhancement Act of 2012 (WPEA) was enacted on November 27, 2012, and became effective on December 27, 2012. This was after the record closed on review in this appeal. We do not reach the issue of whether the WPEA

substantial and specific danger to public health or safety. *Schneider v. Department of Homeland Security*, 98 M.S.P.R. 377, ¶ 8 (2005). To establish that the appellant had a reasonable belief that a disclosure met the criteria of § 2302(b)(8), he must prove that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably could conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Id.*

¶21 Here, the administrative judge found that the appellant proved that, based on the credit card delinquency reports, he had a reasonable belief that the CFO's misuse of his government credit card violated laws, rules, and regulations regarding government credit cards and travel monies, and therefore the appellant made a protected disclosure to OSC. *See* ID at 31-33. The agency does not contest that finding, and we discern no reason to disturb it.

¶22 An employee who establishes that he made a protected disclosure has the additional burden of showing that the disclosure was a contributing factor in the covered personnel actions.[12] *Schneider*, 98 M.S.P.R. 377, ¶ 16. An employee

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applies retroactively to this appeal because it does not appear that the WPEA effected any changes in the law that might be material to the outcome.

[12] The administrative judge found that the personnel actions at issue in this appeal, i.e., significantly changing the appellant's duties, relocating the appellant's office, investigating the appellant, and demoting the appellant, are covered personnel actions under 5 U.S.C. § 2302(a)(2)(A). ID at 33-34. However, an investigation is not generally a personnel action under 5 U.S.C. § 2302(a)(2)(A). Nevertheless, the Board has held that it is proper to consider evidence regarding an investigation if it is so closely related to a personnel action that it could have been a pretext for gathering information to retaliate for whistleblowing. *Mattil v. Department of State*, 118 M.S.P.R. 662, ¶ 21 (2012). Here, the results of the investigation of the appellant for alleged misconduct concerning his advice to destroy emails that he believed were potentially discoverable in future litigation formed the basis for the demotion action, which is a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iii). Thus, we have considered evidence regarding the agency's investigation into the appellant's alleged misconduct in analyzing whether the agency demoted the appellant in reprisal for his whistleblowing.

may demonstrate that a disclosure was a contributing factor in the covered personnel actions through circumstantial evidence, such as the acting officials' knowledge of the disclosure and the timing of the personnel action. *Id.* Thus, an appellant's submission of evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, i.e., evidence sufficient to meet the knowledge-timing test, satisfies the contributing factor standard. *Id.*

¶23 On review, the agency disagrees with the administrative judge's finding that the appellant proved, by way of the knowledge-timing test, that his protected disclosure was a contributing factor in the agency's decision to demote him from a GS-14 Branch Chief to a GS-13 Human Resources Liaison. *See* PFR File, Tab 5 at 25-28; ID at 34-35. It contends that the appellant failed to prove that the deciding official knew of the appellant's OSC disclosure, and therefore his disclosure was not a contributing factor in the deciding official's decision to demote the appellant. *See* PFR File, Tab 5 at 27. We disagree. The appellant's written response to the proposal notice clearly apprised the deciding official that he believed he was being retaliated against for contacting OSC about the CFO, as did the appellant's email to the deciding official requesting an extension of time to respond. *See* IAF-0390, Tab 5, Subtab 4b; IAF-0295-2, Tab 18, Subtab J. Further, in the decision notice, the deciding official expressly stated that he gave careful consideration to the appellant's written response. IAF-0390, Tab 5, Subtab 4a at 1. Moreover, the agency does not dispute the administrative judge's finding that the proposing official knew of the disclosure before she proposed the demotion. ID at 35; *see Visconti v. Environmental Protection Agency*, 78 M.S.P.R. 17, 23-24 (1998) (a proposing official's knowledge of protected disclosures may be imputed to the deciding official).

¶24 As the administrative judge found regarding the timing of the action, the record reflects that in November 2008, the appellant told an agency manager

about his disclosure to OSC regarding the CFO's misconduct. Soon thereafter, the manager initiated an investigation into the appellant's alleged misconduct. Based on the results of the agency investigation, the agency proposed to demote the appellant in December 2009. The deciding official for the demotion learned of the appellant's disclosure to OSC by February 2010, and the demotion was effected in June 2010. IAF-0390, Tab 5, Subtab 4a at 1; *see* February 1, 2011 Hearing Transcript (HT) at 11-14; IAF-0390, Tab 5, Subtab 4b at 3, Subtab 4c, Subtab 4e at 20; IAF-0295-2, Tab 18, Subtab B at 5, 17-30, Subtab I, Tab 24. Under these circumstances, we find that the appellant proved by way of the knowledge-timing test that his protected disclosure was a contributing factor in the agency's decision to demote him.

The joined IRA appeals

¶25 An employee may seek corrective action under the WPA with respect to any "personnel action" taken or proposed to be taken against him as the result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(a); *Mattil v. Department of State*, 118 M.S.P.R. 662, ¶ 14 (2012). In an IRA appeal, the appellant must first prove that the Board has jurisdiction over the appeal by proving that he exhausted his administrative remedies before OSC and nonfrivolously alleging that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 7 (2011). Once the appellant successfully proves jurisdiction, he must establish a prima facie case of whistleblower reprisal by proving by preponderant evidence that he made a protected disclosure that was a contributing factor in a personnel action against him. *Mattil,* 118 M.S.P.R. 662, ¶ 11.

1. The appellant proved jurisdiction over his joined IRA appeals.

¶26 To satisfy the OSC exhaustion requirement, an appellant must first file a complaint with OSC, giving that agency a sufficient basis to pursue an investigation that might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992); *Mason*, 116 M.S.P.R. 135, ¶ 8. Here, in the joined IRA appeals, the administrative judge found that the appellant met the exhaustion requirement regarding his claims that, in reprisal for disclosing to OSC the CFO's misuse of his government credit card, the agency significantly changed his duties, relocated his office, and proposed his demotion.[13] ID at 6. Further, neither party disputes the administrative judge's finding that the appellant nonfrivolously alleged that he made a protected disclosure to OSC about the CFO's misuse of his government credit card, which was a contributing factor in the agency's decision to significantly change his duties, to relocate him, and to propose his demotion. *See* ID at 5-7. Thus, we discern no reason to disturb the administrative judge's finding that the appellant proved jurisdiction over his joined IRA appeals.

2. The appellant proved that he made a protected disclosure that was a contributing factor in the personnel actions at issue.

¶27 To establish that he made a protected disclosure under the WPA, an appellant must demonstrate by preponderant evidence that he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety. *Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, ¶ 9 (2011). As previously set forth in our analysis of the appellant's affirmative defense of whistleblower reprisal, neither party disputes the administrative judge's finding that the appellant proved

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[13] As previously set forth in this decision, the appellant did not exhaust his remedies before OSC regarding the implemented demotion action. *Supra* ¶ 6 n.5.

that he reasonably believed that the CFO's misuse of his government credit card violated laws, rules, and regulations regarding government credit cards and travel monies, and therefore the appellant made a protected disclosure to OSC. *See* ID at 31-33. We discern no reason to disturb this finding.

¶28 To prevail on a claim under the WPA, an appellant must also prove by preponderant evidence that his disclosure was a contributing factor in the covered personnel actions. 5 U.S.C. § 2302(b)(8)(A); *Stiles*, 116 M.S.P.R. 263, ¶ 18. One way to establish this criterion is the knowledge-timing test, which is more fully explained above. *Stiles*, 116 M.S.P.R. 263, ¶ 20; *see supra* ¶¶ 25-27.

¶29 On review, the agency disagrees with the administrative judge's finding that the appellant proved, by way of the knowledge-timing test, that his protected disclosure was a contributing factor in the agency's decision to significantly change his duties, to relocate his office, and to propose his demotion from a GS-14 Branch Chief to a GS-13 Human Resources Liaison. *See* PFR File, Tab 5 at 25-28; ID at 34-35. Among other things, the agency reasserts that its Office of General Counsel (OGC) made the decision to investigate the appellant and to relocate his office, and that the appellant failed to prove that OGC knew about his disclosure to OSC. PFR File, Tab 5 at 25-27. Although an Assistant General Counsel in OGC informed the proposing official that OGC strongly recommended commencing an investigation into the appellant's misconduct and relocating the appellant's office, the proposing official ultimately made the decision to relocate the appellant's office and to propose the appellant's demotion after being briefed on the appellant's misconduct. *See* IAF-0295-2, Tab 21, Ex. 2; February 1, 2011 HT at 22-24, 63-64. We therefore disagree with the agency that the knowledge-timing test fails merely because OGC lacked knowledge of the appellant's disclosure.

¶30 The administrative judge determined that the appellant met the knowledge-timing test because the agency official who directed that the appellant be moved from his position and investigated, and who also proposed his

demotion, did so after learning of the appellant's disclosure to OSC. ID at 35. The agency has not shown any error in the administrative judge's finding that the appellant proved by way of the knowledge-timing test that his protected disclosure was a contributing factor in the agency's decision to significantly change his duties, to relocate his office, and to propose his demotion. *Id.* Thus, we discern no reason to disturb this finding.

3. Clear and convincing evidence

¶31 Because the personnel actions at issue in these this case (significant change of duties, change of office, proposed demotion, and demotion), are factually intertwined, we agree with the administrative judge's approach of considering them together for purposes of the clear and convincing evidence analysis. ID at 35.

¶32 If an appellant makes out a prima facie claim of reprisal for whistleblowing, the agency is given an opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action even in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2); *Ryan v. Department of the Air Force*, 117 M.S.P.R. 362, ¶ 12 (2012). In determining whether the agency has carried its burden, the Board will consider all the relevant facts and circumstances, including: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶¶ 14-15 (2004).

¶33 In this case, the administrative judge made detailed findings on the clear and convincing evidence issue and found that the agency failed to meet its burden. ID at 35-42. She found that several facts undermined the strength of the

agency's evidence in support of its actions. Among other things, the administrative judge found that the proposing official never reviewed the evidentiary package supporting the proposed demotion; the proposing official failed to order a customary case analysis for the matter; the individual advising the proposing official rejected a case analysis by the servicing personnel office that recommended a 30-day suspension without even discussing it with the proposing official; the deciding official lacked understanding of the evidence supporting the demotion action; and the appellant remained responsible for leading and providing advice and policy in the position to which he was demoted even though the agency's proffered reason for the demotion was to take such responsibilities away from him. ID at 38-42.

¶34 The administrative judge also found evidence to show that the agency treated non-whistleblowers less harshly than it treated the appellant, comparing the agency's treatment of the CFO upon whom the appellant blew the whistle with its treatment of the appellant himself. The administrative judge found that the agency failed to investigate the CFO's misconduct even after it learned of it, whereas the agency immediately moved the appellant out of his position and instituted an investigation when it learned of his misconduct. ID at 40-41.

¶35 The administrative judge also found evidence that the agency officials involved had motive to retaliate. She found that the proposing official admitted to her disapproval of and distress over the appellant's whistleblowing activity, and that the whistleblowing activity was critical of the agency in general. ID at 41-42.

¶36 We see no reason to disturb these findings. However, the administrative judge also found that the agency's case was undermined by its failure to prove either charge underlying the demotion. ID at 38. As explained above, the agency proved both of the charges. *Supra* ¶¶ 12, 17. We find that this is a factor weighing in favor of the agency on the clear and convincing evidence issue, but that the administrative judge did not consider it as such. *See Pedelelose v.*

Department of Defense, 110 M.S.P.R. 508, ¶ 24 (2009) (the agency showed by clear and convincing evidence that it would have suspended the appellant despite his whistleblowing by, among other things, providing sufficient evidence to support the underlying charges).

¶37 A proper analysis of the clear and convincing evidence issue requires that all the evidence be weighed together—both the evidence that supports the agency's case and the evidence that detracts from it. *Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012). Because the administrative judge did not consider that the agency proved both of its charges, we find that the relevant evidence as a whole must be re-weighed. We further find that the administrative judge is in the best position to do so because she is the one who heard the live testimony and made credibility determinations. *See Taylor*, 107 M.S.P.R. 306, ¶ 13. In conducting her analysis, the administrative judge should be mindful of the court's decision in *Whitmore*, 680 F.3d at 1368-72, and consider all the relevant evidence as a whole, including the evidence discussed above, *supra* ¶¶ 12, 17, 18 n.10, 33-35, the agency's 513-page investigative report, IAF-0295-2, Tabs 24-25, and any other evidence that she finds relevant.

ORDER

¶38 We remand this case to the Denver Field Office for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall make new findings on whether the agency carried its burden of proving nexus and the reasonableness of the penalty with regard to the demotion action.

She shall then determine whether the agency proved by clear and convincing evidence that it would have taken the personnel actions at issue even in the absence of the appellant's whistleblowing.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.